No. 21047

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES W. CORRINGTON,

Appellant,

vs.

JAMES E. WEBB, etc., *et al.*

REPLY BRIEF OF APPELLANT, JAMES W. CORRINGTON.

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Preliminary Statement.

The Trial Court took great pains to make it clear that it was not passing upon the merits of the complaint, but was passing exclusively on the issue of laches. In directing the re-drafting of the Findings of Fact and Conclusions of Law, the Trial Court reiterated its position that it was not considering the merits.

However, the Plaintiff and Appellant agrees with Defendants and Respondents that with the entire file before the Court, it would not be inappropriate for your Honorable Court to rule upon the merits and, if the Court deemed the position of Plaintiff and Appellant to be well taken, to direct the Trial Court to grant Plaintiff's motion for judgment on the pleadings.

Appellant Was Deprived of Due Process of Law.

The admissions contained in the answer to the complaint are essentially admissions of all of the facts which are pleaded. The denials are merely denials of the legal effect of those facts.

The essence of the admissions are that plaintiff, a native-born citizen of the United States, and a veteran of World War II, entitled to Veterans Preference eligibility under the Veterans Preference Act of 1944, was an employee of the National Aeronautics & Space Administration. He had been so employed for a period of some twenty years.

On or about February 8, 1962, removal proceedings were commenced against Plaintiff alleging a series of incidents. Plaintiff selected a fellow employee to act as his representative at his hearing.

In preparation for his hearing plaintiff submitted to his employer a list of witnesses whom he desired to attend such hearing and testify on his behalf. He was informed that only five witnesses would be permitted to testify. He designated such five witnesses. Thereafter, he submitted an additional designation of witnesses whom he desired to appear. He also demanded that the aircraft log book be made available in rebuttal to the allegations contained in Incident No. 1. Both of these requests were refused. Thereafter, plaintiff was dismissed.

The instant proceeding involves what is no longer a novel principle of federal law. As far back as *United*

States ex rel. Accardi v. Shaughnessey, 347 U.S. 260, the United States Supreme Court made clear that regulations pertaining to the conduct of administrative hearings must be strictly complied with by the Government in order to avail the citizen of due process of law.

Thereafter, *Accardi* was applied by the Court in *Service v. Dulles,* 354 U.S. 363, in holding that the regulations relating to the loyalty and security of employees which covered the discharge of employees had to be strictly complied with by the Secretary of State.

These two earlier decisions were concerned primarily with the question of whether regulations for the conduct of administrative proceedings which were adopted by regulatory agencies or the exercise of discretionary authority become mandatory upon the Government once they had been adopted. The finding in each case was in the affirmative.

The Court relied to some degree upon these earlier decisions in approaching for the first time the question of the procedural rights of employees in resisting dismissal from federal employment. In considering the applicability of procedural due process the Court did, in 1959, indicate that the rules of procedure adopted by an administrative agency must guarantee to the employee procedural due process, including the right to appear in an orderly proceeding to present evidence and to confront witnesses called against him.

Vitarelli v. Seaton, 359 U.S. 535.

Following the *Vitarelli* decision at the same session of Court the majority stated:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him'. This Court has been zealous to protect these rights from erosion."
>
> *Greene v. McElroy,* 360 U.S. 474, 496-497.

Finally, the Court reached the position in which plaintiff stands in the instant case. In 1963, it considered the matter of *Williams v. Zuckert.* In its original decision which appears at 371 U.S. 531, the Writ of Certiorari was dismissed, holding that the *Vitarelli* issue had not been properly presented to the Court. The Court did note in its per curiam decision that:

> "The request for production of the witnesses, made only at the hearing by petitioner's counsel,

was neither timely nor in conformity with the applicable regulations, which contemplate that the party desiring the presence of witnesses, either for direct examination or cross-examination, shall assume the initial burden of producing them.

Had petitioner discharged this burden by timely attempt to obtain the attendance of the desired witnesses and through no fault of his own, failed, then, to give meaning to the language contained in the regulations affording the 'opportunity . . . for the cross-examination of witnesses,' the Air Force would have been required, upon proper and timely request, to produce them, since they were readily available, and under the Air Force Control (Vitarelli v. Seaton, US supra) would so require."

Thereafter, a petition for rehearing was filed. On April 22, 1963, the judgment of the trial court was reversed with directions to the trial court to hold a hearing and determine whether the petitioner, desiring the presence of witnesses at his hearing, either discharged his initial burden under the applicable regulations by making timely and sufficient attempt to obtain their presence or, under the circumstances and without fault of his own, was justified in failing to make such attempt, and, if so, whether proper and timely demand was made upon the Air Force so that it was required to produce such witnesses (372 U.S. 765).

The regulations provide that witnesses may not be subpoenaed for an appearance before the Civil Service Commission. The procedure is for the employee to submit the names of the witnesses who are under the control of the Government and request their attendance.

This was done in the instant case and without reason and without cause, was rejected. Considering the multiple nature of the incidents alleged, plaintiff's employer apparently rationed him to one witness per incident. By depriving him of the use of the Log Book, plaintiff was also deprived of an opportunity to effectively cross-examine witnesses against him on the first incident. Under these circumstances the record indicates the sort of deprivation of rights which Mr. Justice Douglas denounced in his dissenting opinion to the first *Williams* decision wherein he noted that the constitution protects human rights in administrative hearings as well as in criminal proceedings under the Fifth Amendment.

Respondents' brief relies upon a line of cases exemplified by *Devine v. Campbell,* 194 F. 2d 876, which holds that the burden of producing witnesses at a Civil Service hearing is on the party who wants them. The significant thing to note in this case, however, is not a contention by the plaintiff that his request for the presence of witnesses was not carried out by the defendants. Rather, it is his contention that the witnesses were available but that their presence was forbidden by the defendants. The letters from the appointing authority make it clear that it would only permit five witnesses to appear and testify on plaintiff's behalf without regard to the number of witnesses which he required to adequately present his defense. Similarly, the defendants flatly refused to produce a log book which was essential to the plaintiff's defense.

Thus, the thrust of the plaintiff's case is not that the Government failed to discharge the plaintiff's duties in procuring witnesses, but rather that the Government ac-

tively interferred with and prevented the attendance of witnesses on the plaintiff's behalf.

Under this set of circumstances, then, plaintiff has demonstrated that he did all that he could do in producing witnesses since, if he could not compel their attendance by coercive process, the refusal of the defendants to allow the witnesses to testify ended whatever opportunity plaintiff had to present evidence on his own behalf.

Conclusion.

In view of the foregoing, it is clear that plaintiff has done all of those things which he could possibly have done to vindicate his rights and that his attempts were frustrated at every step by wilful interference by the respondents.

Respectfully submitted,

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Dated: February 16, 1967.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

LIONEL RICHMAN